United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7659

United States Court of Appeals

FOR THE SECOND CIRCUIT

VICENTE LUGO,

Plaintiff-Appellant,

—against—

ISTHMIAN LINES, INC.,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE

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Preliminary Statement

This is a personal injury action brought by a seaman against a shipowner to recover damages for the alleged negligence of the defendant and/or unseaworthiness of the vessel. After one mistrial before Honorable Richard Levet and a jury, because of the jury's inability to arrive at a verdict, the case was tried a second time before Honorable Frederick Van Pelt Bryan and a jury from June 24 to July 1, 1975. The jury returned a verdict in favor of the defendant. Plaintiff filed a post-trial motion to set aside said verdict and for a new trial. The motion was denied in an opinion by Judge Bryan dated October 23, 1975, and not officially reported. Judgment for the defendant was entered October 30, 1975. Plaintiff filed a Notice of Appeal on November 24, 1975.

Questions Involved

1. Whether the district court erred in its charge to the jury on the issue of causation by not using the exact language in its charge as requested by the plaintiff.

2. Whether the jury's verdict finding the defendant negligent or the vessel unseaworthy but that that negligence or unseaworthiness was not a proximate cause of the plaintiff's accident and alleged injuries, renders the verdict inconsistent and contrary to the weight of the evidence.

3. Whether the district court abused its discretion in not permitting plaintiff to present a hypothetical question to his medical witness, an orthopedist, seeking to establish a relationship between plaintiff's accident and the allegedly inadequate ventilation in the hatch because the court found this expert was not qualified to give an opinion on this question.

The Facts

On June 1, 1972, while working in #2 hatch, lower tween deck, aboard the SS STEELMAKER, a merchant vessel which was at sea, Seaman Vicente Lugo fell into one of the two deep tanks in which work was being performed by the crew. The cause of the accident was in dispute at both trials.

Plaintiff's theory was that the accident was caused by inadequate illumination and a hot, stuffy atmosphere due to inadequate ventilation.

Defendant contradicted plaintiff's charges and contended that in any event nothing it did caused plaintiff's accident

which resulted from his own inattention to his surroundings, and/or his poor eyesight and/or his own weak physical condition and/or the normal movement of a merchant vessel at sea.

Plaintiff was a seaman on the 4-8 watch, commencing work that day at 0400 hours in the ship's wheelhouse, a place remote from the scene of the accident which subsequently occurred. The ship was enroute between Guam and Hawaii. When he finished his watch at 0800, since he had been sweating, he changed his shirt (2sa).* After his morning coffee break, he again went to his room to change his shirt and take salt (14sa; 58sa; 86sa).

After breakfast, Mr. Lugo and two other seamen went to the #2 hatch to remove duct plates from the ventilation system in the deep tanks in the #2 hatch (6sa). This was a routine job (144sa; 171sa). All of the men were experienced seamen (134sa) and insofar as plaintiff was concerned no tools were required for the performance of his work. All of the workers were regarded as very capable (38sa; 134sa; 149sa; 92sa).

The deep tanks had carried a cargo of lube oil which had been discharged approximately 2 months earlier (12sa), and the tanks had been thoroughly cleaned after discharging the lube oil (136sa; 127sa; 165sa). No claim was made by the plaintiff that the cargo was of a toxic nature. Moreover, plaintiff was not working in either deep tank but rather on the deck surface of the #2 lower tween deck (23sa).

Obviously, in order to accomplish the job, the tank top covers had been removed. Since the vessel was at sea

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* References to Appellant's Appendix are designated by (a). References to Appellee's Supplemental Appendix are designated (sa).

traversing a considerable distance in open seas and since heavy weather was anticipated prior to the vessel's arrival at Hawaii the main deck hatch was covered (138sa). The vessel was rolling and pitching moderately but obviously no claim of liability was made on this basis.

The three seamen on the job (the other two named La France and Palmer) knocked off for the mid-morning coffee break. Significantly, no complaints were made either before the work commenced nor at the coffee break *nor at any time before or after the accident*, up until this lawsuit, by plaintiff or his fellow seamen, that the ventilation or illumination were inadequate or improper (56-57sa; 59sa; 87sa; 124sa; 93sa), despite that the plaintiff claimed while working before his coffee break he had had trouble breathing and was sweating (20-21sa).

Although the main deck hatch was covered, there was an alternate means of ventilation, viz., natural ventilation through the escape hatch and the trunks (162-163sa). Lighting was provided by two portable cargo lights of the customary or usual type and wattage (38sa; 77sa). The only claim with respect to inadequate illumination was plaintiff's claim that one of the lights was improperly positioned, so that it cast a shadow: plaintiff's own shadow in which he was working at the time of the accident (32sa; 80sa; 130sa).

Following the coffee break at about 10:15 hours, the men returned to the hatch. Plaintiff positioned himself in a spot where he was able to and in fact did hand one or more pieces of wood to La France who in turn transmitted said piece to Palmer who was down, inside one of the deep tanks (80sa). Plaintiff had completed the passing of the piece of wood when, by his own testimony, he felt hot, it was stuffy, and he simply toppled or fell into one of the open deep tanks (30sa; 33sa).

This version of the accident is corroborated by La France who without objection was quoted by Captain Sidga as saying that he saw Mr. Lugo simply fall into the aft, port deep tank (103sa).

According to the testimony of the defendant's expert, Captain Wheeler, and Chief mate Minor, it was not only customary and normal practice but a prudent practice to keep the main deck hatch covered while the vessel is at sea, particularly for a lengthy period of time trans-Pacific (173sa; 184sa; 138sa). Plaintiff's own expert, Captain Horka, admitted that if a vessel might encounter heavy weather it would be good judgment to have the main deck hatch remain covered (113-114sa).

Captain Wheeler also testified that when working with portable cargo lights as these men were doing, said lights can be best positioned or placed by the men themselves, so as to eliminate the casting of shadows (179sa). It is significant that prior to the accident and prior to this lawsuit there was absolutely no complaint from any of the men, including the plaintiff himself, and his key witness, Bos'n Gomez, concerning any alleged inadequacy of ventilation or illumination (702-703sa; 56-57sa; 59sa; 87sa; 124sa; 93sa).

Captain Wheeler and Chief mate Minor testified there was not only natural ventilation entering the hatch through the escape hatch and trunk (162-164sa; 517). Captain Wheeler also testified that the utilization of the vessel's forced ventilation system (there was no claim that said system was not functioning properly), might have introduced either dust into the atmosphere or it might have resulted in an intake of hotter air from the atmosphere than the air already present in the hatch (167sa; 177-178sa). The vessel was proceeding directly into the sun, consequently there was minimum exposure of that portion of the ship's

hull closest to the working area, to the sun's rays (160sa; 168-169sa). The hour was approximately 10:20 A.M. The level at which the men were working was at or near the level of the cooler sea water (121sa; 170sa; 181sa).

Chief Officer Minor, who entered the hatch immediately after plaintiff's accident in order to assist him, testified that the lighting and ventilation were adequate at the time of the accident (137-137-1sa). Plaintiff's attorney at trial tried to make much of the undisputed fact that appeared in the Official Log entry that additional illumination was needed after the accident for the rescue operation. Several seamen were required for this purpose and much unusual activity was anticipated (for the rescue operation to be distinguished from the normal shipboard work) (137-1sa). Equipment in the form of the ship's booms and winches would be needed (51sa-53sa). It was for this reason that *subsequent* to the accident additional illumination was required in the judgment of the captain (104sa; 157-158sa).

It is noteworthy that by his own admission Mr. Lugo was not moving or walking at the time of the accident (85sa). He admits he did not slip or trip on any structure or obstruction (85sa). There was no physical or structural reason why plaintiff could not have sat down if he had not felt well at the time of his accident (85sa). There was ample room and a solid metal surface behind him, on which to sit (85sa).

The jury, although finding that the defendant was negligent or the vessel unseaworthy, also found in answer to a special interrogatory that there was no proximate cause between said conditions and plaintiff's accident (55sa).

As noted above, plaintiff had gone to his room after coming off the 4 to 8 watch to change his shirt. Thus he had already been sweating and evidently not feeling well

at an hour of the day and at a location on the ship, remote from either the time of the accident or the number 2 hatch. Plaintiff claims he was having difficulty breathing and was sweating during the morning before his coffee break As noted above he went to his room to change his shirt again and to take salt. It is undisputed that plaintiff's ill feeling, which indeed he denied at trial, was not reported to the ship nor to any officer or crew-member.

While the jury was deliberating the foreman asked to have plaintiff's testimony on this point read. The foreman's note which is Court's Exhibit 8 reads as follows: "May we hear Mr. Lugo's testimony regarding how he felt between the time he quit his regular watch and re-entered the deep tank area for the second time" (148a). Very shortly thereafter they returned a defendant's verdict.

Additionally the jury probably was impressed by the fact that plaintiff had been going to his own union clinic (called The Seafarers' Welfare Plan), for annual physical examinations. On June 3, 1971, the date of his last examination prior to the accident, Lugo was examined by a physician, Dr. San Filippo. In response to the question on the clinic form (Defendant's Exhibit A, p. 140a), "Was this man notified of any serious defects? the doctor checked "Yes". Under the caption of recommendation the doctor advised, "Obtain Distant Glasses". Also the doctor noted, "Defective vision—uncorrected". On the date of that examination it was noted that plaintiff possessed "Reading Glasses Only". Corrected vision was 20/50 in the right eye and 20/20 in the left eye. Uncorrected vision was 20/100 in the right eye and 20/40 in the left (74-75sa). This same exhibit notes that on June 10, 1971 glasses were obtained which corrected his vision to 20/50 in the right eye and 20/20 in the left. *Plaintiff admits he was not wearing these glasses at the time of the accident* (68sa). Plaintiff

admitted that during these examinations the doctors told him he had defective vision which should be corrected (70sa).

Thus it is seen that there were several explanations for plaintiff's accident, none of which was such as to render the defendant liable: (1) plaintiff's own, endogenous feeling of ill-being on the morning of the accident which was not reported to the defendant; (2) his deficient eyesight when not wearing glasses; (3) very simply, plaintiff's inattention to his physical surroundings. It is common knowledge that sometimes a man simply does a careless thing such as stepping where he shouldn't or letting his mind wander momentarily from the job at hand.

Argument

Summary of Argument

The appellant argues that the court erred in not charging the jury with precise quotes from *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 (1957) on the issue of causation. Appellee contends the charge as given by the District Court fairly stated the proper standard for determining the degree of negligence or unseaworthiness which could render the defendant liable.

The appellant seems to imply that causation can be eliminated as an ingredient in a Jones Act case. Appellee answers this in the negative, *Marine Sulphur Queen*, 460 F. 2d 89 (2d Cir. 1972), cert. den. 409 U.S. 982.

A party has no vested interest in any particular form of instruction; the language of the charge is for the trial court to determine, *Shaw* v. *Lauritzen*, 428 F. 2d 247 (3d Cir. 1970).

Appellant's attack on the alleged inconsistency of the verdict must fall because (a) a finding of no proximate

cause simply is not an inconsistency and (b) as the Supreme Court has held in *A. & G. Stevedores* v. *Ellerman*, 369 U.S. 355 (1962), every effort must be made to reconcile inconsistent verdicts.

Appellant Lugo had a legal duty to make use of his own faculties or senses in order to observe and avoid any obvious danger. *Nagel* v. *Isbrandtsen Co.*, 177 F. 2d 163, 164 (2nd Cir. 1949). A seaman has a duty to avoid open, obvious or apparent hazards.

The mere occurrence of an accident does not constitute liability, a vessel owner is not an insurer and the test of a ship's fitness is reasonable fitness, not perfection. *Mitchell* v. *Trawler Racer*, 263 U.S. 539 (1960).

Appellant's proposed expert had already completed his testimony within his own field of experience (orthopedics). As an "extra", plaintiff tried to extract from him an opinion in an area in which the jury was fully qualified to make a determination. The trial judge sustained defendant's objection and this is not error, *Salem* v. *United States Lines*, 370 U.S. 31, 35 (1962). Moreover plaintiff made no offer of proof.

Finally, appellant, in placing emphasis upon his version of the evidence and in omitting any reference to the defendant's proof at trial in both his brief and his appendix,* misconceives his appellate burden, i.e., to persuade this court that there was no issue to go to the jury. Otherwise a reviewing court must, under the Seventh Amendment, sustain the verdict of the jury (as did the decision written by Judge Bryan) as long as there is evidence to support it, *International Terminal Operating Co.* v. *Nederl*, 393

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* Appellant did not follow the provisions of Rule 30. (b) F.R. A.P., hence the need for a supplemental appendix. *Peyman* v. *Perini Corporation*, 507 F. 2d 1318 (1st Cir. 1974).

U.S. 74 (1968). Such evidence was amply supplied by witnesses Sigda, Minor and Wheeler, the deck log, the union clinic physical examination records; and even by the plaintiff's own witnesses, Gomez and Horka, as well as by the cross-examination of plaintiff himself.

POINT I

The Court Having Properly Instructed the Jury on Unseaworthiness, Negligence and Causation Was Not Required to Deliver Its Instructions Either in the Specific Words Requested by Any Party or in the Exact Language of Any Opinion.

The court's charge to the jury, insofar as is relevant to the issues on appeal, was as follows: (21, 22a)

> The first question you will be asked to answer, and I am quoting, "Was the S.S. STEELMAKER unseaworthy or was the defendant, Isthmian Lines, negligent?" This question, of course, is with respect to the conditions of the No. 2 hatch at the time the accident occurred. You will be asked to answer that question yes or no. If you answer the question no, you will go no farther and report your answer to the Court. If the answer to that question is yes, you then go on to the second question which is the question of proximate cause.
>
> What do I mean by proximate cause? Proximate cause means, in effect, a producing cause of the accident which resulted in the injury. It must be an unbroken chain of events or circumstances flowing from the unseaworthiness or the negligence, if you find there was such, and leading to the accident. There must be a direct causal connection between unseaworthiness or

> negligence if you find any and the accident which caused the injuries.
>
> The question is whether *any* unseaworthy condition of the vessel or *any* negligence on the part of the shipowner *played any role* in producing the accident which Lugo suffered and the injury which resulted from that accident. Thus, the second written question to be submitted to you is, "Whether or not unseaworthiness of the STEELMAKER or negligence of the defendant shipowners was *a* proximate cause of the accident and the injuries which the plaintiff suffered." [Emphasis added]

As is seen from the charge Judge Bryan in fact used the word "any" several times during his instructions to the jury. He made it clear that the question was whether any unseaworthiness or any negligence by the defendant played any role in producing the accident.

The Supreme Court in *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500 at 506, 507 (1957), when speaking about causation and the amount of the defendant employer's negligence, was seeking to free plaintiffs under the FELA and Jones Act from the traditional common law causation requirement that the defendant employer's negligence was the sole producing cause of injury.

> "The Missouri court's opinion implies its view that this is the governing standard by saying that the proofs must show that 'the injury would not have occurred but for the negligence' of his employer, and that '[t]he test of whether there is causal connection is that, absent the negligent act the injury would not have occurred.' That is language of proximate causation which make a jury question dependent upon whether the jury may find that the defendant's neg-

ligence was the sole, efficient, producing cause of injury.

"Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.

In *Peyman* v. *Perini Corporation*, 507 F.2d 1318 (1st Cir. 1974) the court described this distinction as follows, at page 1324:

"The reason why under the Jones Act the plaintiff is entitled to a charge that he need show only that defendant's negligence contributed to his injury was fully explained in *Rogers*. Basically it is because, as distinguished from the common law, where defendant's negligence must be the 'sole, efficient, producing cause' and plaintiff would be barred if his own negligence was a contributing cause, the Jones Act 'expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence.' *See* 352 U.S. at 505-507, 77 S.Ct. at 449. But so does the law of unseaworthiness. Pope & Talbot, Inc. v. Hawn, 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143. This does not mean, in either instance, that defendant's fault must not

be shown to be *a* cause—there must, of course, be a connection—it merely need not be *the* cause. The distinction was well brought out in Farnarjian v. American Export Isbrandtsen Lines, Inc., 2 Cir., 1973, 474 F.2d 361, at 364."

As plaintiff-appellant notes in his brief, p. 28, the Second Circuit in *Farnarjian* v. *American Export Isbrandtsen Lines, Inc.*, 474 F.2d 361, 364, criticized the District Court's charge in that case saying:

> "There is simply no place in a Jones Act charge for the 'substantial factor' language in defining proximate cause, however sensible that phrase may be in other contexts."

However, the Court, *supra* at 364, did not state that the language of *Rogers*, or any other case was a "requirement" in a Jones Act case:

> "The Jones Act incorporates by reference the language of the Federal Employers' Liability Act, which makes an employer liable in damages for injury to an employee 'resulting in whole or in part from' the employer's negligence. 45 U.S.C. § 51. The cases have emphasized this language *in a variety of contexts*. See, e.g., Rogers v. Missouri Pacific R. R., supra, 352 U.S. at 506, . . . DeLima v. Trinidad Corp., supra, 302 F.2d at 587-588. . . . To say that an employer's negligence was a 'substantial factor' in causing an employee's injury *is not the same as saying that the negligence played 'any part at all.'* The two concepts are simply incompatible, and joining them is at best confusing." [Emphasis added]

Judge Bryan did not give the traditional proximate cause charge to the jury in this case as alleged by plain-

tiff. The court made it clear in its charge that the jury could find defendant liable if it found that "any" negligence of the defendant or "any" unseaworthiness of its vessel "played any role in producing the accident".

In *Delima* v. *Trinidad Corp.*, 302 F. 2d 585 (2nd Cir. 1962) cited by plaintiff, the district court gave a traditional common law charge of causation that inferred the defendant's negligence or unseaworthiness had to be the sole producing cause. The Second Circuit quoted that charge at 302:

> "Proximate cause is that cause which in the natural and continuous sequence unbroken by any efficient intervening cause, produces the result complained of, and without which it would not have occurred".

The *Delima* court cited the *Rogers* language because it recognized that in the Supreme Court's view, the FELA and Jones Act are departures from traditional common law principles.

In this case on appeal the District Court did not use language connoting the defendant's negligence or the vessel's unseaworthiness had to be a "substantial factor" or "sole" cause of the accident. The charge given by the District Court in this case is clearly distinguishable from the charges critized in *Farnarijan*, supra and *Delima*, supra.

In *Bertrand* v. *Southern Pacific Company*, 282 F.2d 569 (1960), the Ninth Circuit held that the district court properly refused to give a proposed instruction which paraphrased in part the language of the *Rogers* opinion, saying at page 589:

> "* * * The court in that case [*Rogers*], however, was not speaking of 'the test of liability of the railroad

carrier' (the language used in the proposed instruction) but 'the test of a jury case.' If the proofs justify with reason the conclusion that employer negligence played any part, 'even the slightest,' in producing the injury or death, then the issue of causal relation must go to the jury. The Supreme Court was here using the word 'proofs' to mean 'evidence.' But the fact that the proofs or evidence justify with reason a finding of causal relation does not mean that the jury is required to make such a finding.

"The proposed instruction is faulty because it bound the jury to find what it was entitled to find but was not required to find. * * *"

In *Jamis* v. *Continental Insurance Company*, 424 F.2d 1064 (3rd Cir. 1970), the Court stated at page 1065:

"A party has no vested interest in any particular form of instructions; the language of the charge is for the trial court to determine. If, from the entire charge, it appears that the jury has been fairly and adequate instructed, as we find it was, then the requirements of the law are satisfied. Barnett v. United States, 290 F.2d 795 (C.A. 5, 1961)."

In *Franks* v. *United States Lines Company*, 324 F.2d 126 (2nd Cir. 1963), the court stated at page 127:

"Plaintiff attacks the charge in this case on varied grounds, but we find none of them to be sustained. Trial judges must be allowed some leeway, and absolute clarity is hardly to be always expected. True, a single ruling can vitiate an entire charge if it is on a vital issue and is misleading. DeLima v. Trinidad Corp., 2 Cir., 302 F.2d 585. But here the areas of ambiguity which plaintiff stresses were made suf-

> ficiently clear by the charge as a whole to assure him a fair consideration of all his theories. 'A charge must be interpreted as a whole, * * * not in individual parts.' Sutton v. Pu .c Service Interstate Transp. Co., 2 Cir., 157 F.2d 947, 948, cert. denied, 330 U.S. 828, S.Ct. 870, 91 L.Ed. 1277."

The basic question which appellant cannot avoid is whether causation in a personal injury case can be eliminated as an ingredient particularly where the jury has found that no proximate cause existed.

Plaintiff appears to desire that there is no requirement of proximate cause in FELA cases. This is not so. Even in the leading cases of *Rogers* v. *Missouri, Pacific,* supra, and *Ferguson* v. *Moore McCormack,* 352 U.S. 521 (1957), relied on so heavily by the Plaintiff, the Supreme Court uses the phrase "played any part." Concededly, in FELA cases, the part which employer's negligence must play in producing the injury need be only a slight one. However, the pronouncement of the Supreme Court itself, is that there is need for *a part to be played.* This, of course, is what the law terms "proximate cause."

It was written by our Circuit in *Marine Sulphur Queen,* 460 F.2d 89 (2 Cir. 1972) cert denied 409 U.S. 982 at Page 99:

> "In accordance with general tort principles a crew member seeking damages against his employer, the owner, either under the maritime doctrine of unseaworthiness or under the Jones Act, has the burden of proving that the ship was unseaworthy or the owner negligent and also that such unseaworthiness or negligence was in fact a cause of his injury. And, just as the mere fact that the injury to the claimant occurred on the ship does not, in itself, establish unseaworthi-

ness, Mosley v. Cia. Mar. S.A., 314 F.2d 223, 229 (2 Cir.), cert. denied, 375 U.S. 829, 835, 84 S.Ct. 52, 11 L.Ed.2d 65 (1963); Richter v. Mathiasen's Tanker Industries, Inc., 297 F.2d 494 (2 Cir. 1961), cert. denied, sub nom., Pinto v. States Marine Corp., 369 U.S. 843, 82 S.Ct. 874, 7 L.Ed.2d 847 (1962), neither does proof of the fact of unseaworthiness, ipso facto, provide the proof of causation, see, Grillea v. United States, 229 F.2d 687, 689, rev'd on other grounds, 232 F.2d 919 (2 Cir. 1956); Ramos v. Matson Navigation Co., 316 F.2d 128, 131 (9 Cir. 1963)."

In *Page* v. *St. Louis Southwest Railway Co.* 312 F.2d 84, 87 (5th Cir. 1963) cited in plaintiff-appellant's brief, the court recognized that the defendant employer was not an insurer under the F.E.L.A. (and by extension the Jones Act) and is liable only if his negligence has a causal connection with the plaintiff's injury:

"The plaintiff's objection to the charge is founded ultimately upon the language of the Act, which makes the defendant liable in damages '* * * for such injury * * * *resulting in whole or in part from the negligence* of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, . . . 45 U.S.C.A. § 51. (Emphasis supplied.)

"The italicized words, 'resulting in whole or in part from the negligence,' would seem sufficient to place beyond cavil or debate the proposition that the Act does not provide workmen's compensation, but that liability is based upon negligence having a causal connection with the injury, and both the Supreme Court and this Circuit are committed to that proposition. [Citing Inman v. Baltimore & Ohio R. Co., 361 U.S.

138 (1959); Simpson v. Texas & New Orleans R. Co., 297 F.2d 660, (5 Cir. 1962)]."

It is elementary that causation is an essential element of any cause of action for negligence. See Prosser *Law of Torts* (3rd Ed.) § 30. Moreover, as Prosser points out in Section 41:

> "An essential element of the Plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the Defendant and the damage which the Plaintiff has suffered. This connection usually is dealt with by the courts, in terms of what is called 'proximate cause,' or 'legal cause.'"

In 2 Norris *The Law of Seamen,* (3rd. Ed.) § 693 it is pointed out quite succinctly:

> "To impose liability upon the shipowner for a negligent act or omission it is necessary for the seaman to prove not only that he suffered an injury but that the negligent act or omission was the proximate cause of his injury or illness. A claim under the Jones Act requires a finding both of negligent breach of duty and proximate cause."

In *Fitzgerald* v. *A. L. Burbank & Co.,* 451 F. 2d 670 (2d Cir. 1971) our appellate court wrote at page 681.

> "As plaintiff claimed at trial, he did not need specific medical testimony to prove that the doctor's negligence was a proximate cause of death. The jury decides whether or not there was proximate cause, and they may do so both in the absence of direct medical testimony on the point, *Sentilles* vs. *Inter-Carribbean Shipping Corp.,* 361 U. S. 107, 109-10, 1960 A. M. C. 10, 12

(1959); *Wilkins* vs. *American Export Isbrandtsen Lines,* 1971 A. M. C. 1870, 1874, 446 F.(2d) 480, 483 (2 Cir., 1971), and, in certain circumstances, even counter to the only medical testimony on causation, see *Crescent Wharf & Warehouse Co.* vs. *CYR,* 1953 A. M. C. 126, 200 F.(2d) 633, 636 (9 Cir., 1952). But, of course, the jury is not permitted to speculate on proximate cause in the absence of reasonably persuasive proof that the negligence was the probable cause of the injury, see *Sentilles, supra,* 361 U. S. at 110, 1960 A. M. C. at 12."

To the same effect is *Henry* v. *A/S Ocean,* 512 F. 2d (2 Cir. 1975) at page 408 which reads:

"Braye, of course, was obligated to offer some reasonable proof that his injuries were proximately caused by the shipowner's breach of duty. Fitzgerald v. A. L. Burbank & Co., 451 F.2d 670, 681 (2d Cir. 1971). Direct medical testimony of causation need not be introduced in every case, Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 109-110, 80 S.Ct 173, 4 L.Ed.2d 142 (1959). But a jury 'is not permitted to speculate on proximate cause in the absence of reasonably persuasive proof that the negligence was the probable cause of the injury,' *Fitzgerald, supra,* at 681 of 451 F.2d."

The jurors in plaintiff's case before Judge Bryan rose to the level of what the law requires when they in turn required of the Plaintiff that he sustain his burden of proof on proximate cause. To now set aside this proper determination will deprive Defendant of its Seventh Amendment right to trial by jury.

POINT II

The Jury's Finding That the Defendant Was Negligent or the Vessel Was Unseaworthy, But That This Negligence or Unseaworthiness Was Not a Proximate Cause of the Plaintiff's Accident and Alleged Injuries Does Not Render the Verdict Inconsistent and Contrary to the Weight of the Evidence.

Plaintiff contends the jury's verdict was inconsistent because they found the shipowner was negligent or the vessel was unseaworthy but that this negligence or unseaworthiness was not a proximate cause of plaintiff's injuries.

The basis rule on appellate review is that unless there is a complete absence of evidence to sustain a jury's verdict, a reviewing court (may) not disturb the verdict lest there be a violation of appellee's right to a trial by jury under the Seventh Amendment.

In *Bernardini* v. *Rederi A/B Saturnis*, 512 F. 2d 660 (2nd Cir. 1975), and cited in plaintiff-appellant's brief, this court recently said at p. 662:

> "The Supreme Court has said that the Seventh Amendment *requires* a court to adopt that view of a case under which a jury's special verdicts may be seen as consistent. Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355." [Emphasis added]

In *Bernardini*, supra, this court found the jury's special verdict that the vessel was not unseaworthy but that the shipowner was negligent, inconsistent and irreconcilable because there was no showing of operative negligence by the shipowner.

Even if this verdict could be regarded as idiosyncratic, which is denied, the appellate courts must make every effort to sustain the verdict under the Seventh Amendment. *Malm* v. *United States Lines*, 269 F.Supp. 731 (SDNY, J. Weinfeld), affirmed on the district court's opinion, 378 F.2d 941 (2d Cir. 1967). See also *Henry* v. *A/S Ocean*, supra at 405, 406.

The jury's verdict in this case was neither ambiguous, conflicting nor inconsistent. A review of the facts above indicate there were several explanations for plaintiff's accident, which the jury could have based its verdict on, none of which was such as to render the defendant liable: (1) plaintiff's own, endogenous feeling of ill-being on the morning of the accident which was not reported to the defendant; (2) his deficient eyesight when not wearing glasses; (3) very simply, plaintiff's inattention to his physical surroundings. It is common knowledge that sometimes a man simply does a careless thing such as stepping where he shouldn't or letting his mind wander momentarily from the job at hand.

Beyond a doubt the jury was justified in finding there was no proximate cause between the shipowner's negligence and/or unseaworthiness and the plaintiff's injuries.

We quote below from Judge Bryan's opinion, 75 AMC at 2239 (86a):

> "Plaintiff had the burden of proving both (1) the unseaworthiness of the vessel or the negligence of the owner, and (2) that such unseaworthiness or negligence was a proximate cause of the accident and injuries. These were separate and distinct issues. *In re Marine Sulphur Queen*, 1972 AMC 1122, 460 F.2d 89, 99 (2 Cir.), *cert. denied*, 409 U.S. 982, 1973 AMC 540 (1972); *Peymana* v. *Perini Corp.*, 1975 AMC 1698,

507 F.2d 1318, 1324 (1 Cir., 1974), *cert. denied*, 421 U.S. 914, 1975 AMC 2159 (1975). The jury found, as it was entitled to do, that while the plaintiff had sustained his burden on the issue of negligence and unseaworthiness, he had failed to do so on the issue of proximate cause. The verdict is in no way inconsistent."

We quote further from Judge Bryan's opinion, 75 AMC at 2239-2240 (87-88a):

"Plaintiff also seems to contend either (1) that the evidence on the issue of proximate cause was so overwhelmingly in his favor as to entitle him to a directed verdict or a judgment n. o. v. on that issue or (2) in the alternative, that the verdict of the jury finding no proximate cause should be set aside as contrary to the weight of the evidence and a new trial granted.

"As the Court of Appeals of this circuit recently stated in *Bernardini* v. *Rederi /AB Saturnus*, 1975 AMC 690, 693, 512 F.2d 660, 662 (2 Cir., 1975):

> 'Whether the motion is one to direct a verdict or to set aside a verdict which the jury has returned, the test applied by the court is the same. The evidence must be viewed in the light most favorable to the party other than the movant. The motion will be granted only if (1) there is a complete absence of probative evidence to support a verdict for the nonmovant or (2) the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair-minded men in the exercise of impartial judgment could not arrive at a verdict against him.' [Citations omitted.]

"Applying these standards to the motion now before the court, it is plain that there is no merit to the plaintiff's contention. The probative evidence before

the jury included testimony as to the physical conditions in the hold and the manner in which the work was conducted and as to plaintiff's excessive sweating and consumption of salt even before he began the task in the hold; his work in the hold for a considerable period prior to a coffee break without any manifest ill effects; his abrupt loss of consciousness shortly after the coffee break; his failure to complain about the lighting or ventilation in the working area; and his failure to wear his eyeglasses. From such evidence and the permissible inferences to be drawn therefrom, the jury could reasonably find that plaintiff's fall into the tank was due to his failure to take reasonable precautions for his own safety, or to some physical defect of which only he could be aware, or that it was purely accidental.

"The finding of the jury that unseaworthiness or negligence was not a proximate cause of the plaintiff's accident has ample support in the record."

The mere happening of an accident is not proof of either negligence or unseaworthiness. The Supreme Court has made it clear that a shipowner is not obligated to furnish an accident-free ship. *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960).

In *Lake* v. *Standard Fruit & Steamship Co.*, 185 F.2d 354 (1950) this court said at page 856:

"(W)e still do not feel that it is legally incumbent upon the employer to provide an accident-proof ship. For in this case the accidents are traced back to perfectly normal equipment on shipboard . . ."

POINT III

The Court Did Not Commit Error When, in Its Discretion, It Did Not Permit Plaintiff's Attorney to Present a Hypothetical Question to His Medical Expert Witness, an Orthopedist, Because It Found This Expert Was Not Qualified to Give an Opinion on This Question. No Offer of Proof Was Tendered by Plaintiff to Support This Point on Appeal.

The contention that it was error to refuse to allow plaintiff's medical expert, an orthopedist, to give an opinion on whether the alleged improper and inadequate ventilation in the hatch could have caused Mr. Lugo to fall finds no support in the caselaw. There are several answers to appellant's contentions. This proposed expert was not qualified by education or experience to give such an opinion. No offer of proof was tendered by the plaintiff to support this point on appeal (see rule 103 Federal Rules of Evidence).

Plaintiff's medical expert, an orthopedist, was not by education or experience qualified to give an opinion on this subject nor was a proper foundation laid for him at trial to give an opinion from a medical point of view on what caused plaintiff to fall. As is stated on Richardson on Evidence (10th Ed.), §368:

> "The prevailing rule is that the question of the qualification of a witness to testify as an expert is for determination, in his reasonable discretion, by the trial court, discretion, when exercised, is not open to review unless in deciding the question the trial court has made a serious mistake or committed an error of law or has abused his discretion."

It would appear completely within the court's discretion to deny the testimony of an orthopedist as to whether the

improper and inadequate ventilation allegedly present in the hatch could causally result in plaintiff's accident.

In *Salem* v. *U.S Lines Co.*, 370 U.S. 31 (1962), the Supreme Court wrote at p. 35:

> "This is not one of the rare causes of action in which the law predicates recovery upon expert testimony. See Wigmore, Evidence (3d ed. 1940), §§ 2090, 2090a. Rather, the general rule is as stated by Mr. Justice Van Devanter, when circuit judge, that expert testimony not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge "if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation . . ." United States Smelting Co. v. Parry, 166 F. 407, 411, 415. Furthermore, the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous. Spring Co. v. Edgar, 99 U.S. 645, 658."

We quote below from Judge Bryon's opinion 75 AMC at 2241, 2242 (90-91a):

> "The determination of the qualification of a witness as an expert and the admission or exclusion of expert testimony are matters left to the broad discretion of the trial court. *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35, 1962 AMC 1456 (1902); *Tropea* v. *Shell Oil Co.*, 307 F.2d 757, 763 (2 Cir., 1962); *Spitzer* v. *Stichman*, 278 F.2d 402, 409 (2 Cir., 1960). The objection to the hypothetical question posed by plaintiff's counsel

to Dr. Koven was sustained in the exercise of that discretion.

"Dr. Koven was an orthopedist. There was question as to his qualifications to express an opinion on the subject of whether conditions in the hold 'could' cause a man to faint. Moreover, expert testimony on this subject was quite unnecessary. All of the facts as to conditions in the hold were before the jury. The jury was fully qualified to make an intelligent determination as to whether or not the conditions they found to exist could have caused plaintiff to faint. As stated in the Advisory Committee's note to Rule 702 of the Federal Rules of Evidence:

> 'There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute. LADD, *Expert Testimony*, 5 Vand. L. Rev. 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous, and a waste of time. 7 WIGMORE, sec. 1918.'

"In any event, exclusion of the Koven hypothetical testimony could not be so prejudicial to the plaintiff as to require a new trial."

CONCLUSION

The judgment below should be affirmed in its entirety. The court did not err in its charge to the jury in this case on the issues of the defendant's negligence and causation. The jury's finding that defendant's negligence or unseaworthiness was not a proximate cause of the plaintiff's accident and alleged injuries does not render the verdict inconsistent. There was abundant evidence to support the jury's finding of no proximate cause. A shipowner is not obligated to furnish an accident-free ship. The court did not err when in its discretion it did not permit plaintiff's attorney to present a hypothetical question to his medical expert because the court felt this expert was not qualified to give an opinion on this question.

Respectfully submitted,

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Of Counsel

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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VICENTE LUGO, :

Plaintiff-Appellant, : Docket No. 75-7659

against :

CERTIFICATE OF SERVICE

ISTHMIAN LINES, INC., :

Defendant-Appellee :

- -

WE HEREBY CERTIFY that a copy of the ~~attached~~ appellee's (2 copies) Brief and Supplemental Appendix (1 copy) was this date served on

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May 3, 1976

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